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TAMPA, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. **Case No. 8:03-CR-77-T-30TBM**

HATIM NAJI FARIZ
_____/

MOTION FOR EXCULPATORY AND IMPEACHING EVIDENCE

COMES NOW, the Defendant, HATIM NAJI FARIZ, by and through undersigned counsel, and respectfully moves this Honorable Court for an order compelling the government to disclose all exculpatory evidence (*Brady* material) immediately. Although a Second Amended Pretrial Discovery Order (Doc. 152) has been entered obligating the government to disclose exculpatory evidence, none has been produced. On the contrary, specific requests have been rebuffed as outside the scope of *Brady,* over broad, vague or too expansive a view of *Brady* or, pursuant to the Second Amended Discovery Order, premature.

The government, most recently, in its Response to Defendant Sami Amin Al-Arian (Doc. 499), again rejecting a defense request for specific discovery materials, conceded that Co-Defendant, Sami Al-Arian was "a source of information" for the United States Government. The government has declined to provide additional information related to Al-Arian's role as a source of information on the basis that the request is overly broad under Rule 16(a) of the Federal Rules of Criminal Procedure and outside of the government's scope of responsibility under *Brady* because it has no duty to produce information the defendant already knows. Although it is possible Al-Arian has knowledge of the circumstances, Hatim

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Fariz has none.[1] This material has inherent *Brady* implications pursuant to the *Sears* rule. No agreement exists when an individual "conspires" to violate the law with a person when that person is a government agent.

The government has also acknowledged the existence of divergent translations leading to unmistakable questions of the accuracy of the translations relied upon by the government to return the instant indictment and in the prosecution of Hatim Fariz. Inconsistent translations fall under the auspices of *Brady* and must also be produced to the defense by the government.

Moreover, the scope, volume and nature of evidence related to this indictment demands disclosure of this and all other *Brady* material immediately as there can be no more "appropriate time" as directed the Second Amended Pretrial Discovery Order.[2] The government has repeatedly asserted that *Brady* materials are not due until 30 days before trial ignores the language of the Order which requires production of these materials "without the necessity of further motions or demands, **at an appropriate time, but at least thirty (30) days prior to the Defendant's trial**." (Doc. 152 at page 2.)(Emphasis added.)

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[1] Selective withholding of *Brady* material is particularly egregious in light of Defendants Fariz and Ballut and the Court's struggle to identify and prioritize the relevant portions of 21,000 hours of wiretap recordings prior to the January trial date.

[2] It should be noted that the receipt of *Brady, Giglio* and related materials 30 days before trial will necessarily result in the filing of responsive motions by the defense mere days before the trial is begun. It is reasonable to assume that a Motion to Sever arising out of information related to the defendant Al-Arian's role as a source of information will not only be forthcoming but also unassailable.

Consequently, Mr. Fariz would request a definitive Order directing the government to immediately disclose all exculpatory and impeachment evidence, including but not limited to evidence concerning; (1) the scope and duration of indicted and indictable co-conspirators as governmental agents be entered in this matter, (2) prior translations of Arabic conversations that are inconsistent with the government's current accepted translations as relied upon in bringing the instant indictment or to be relied upon by the government in the prosecution of the instant matter, and, (3) all other *Brady* materials specifically identified in the memorandum of law.

ARGUMENT AND AUTHORITIES

The limits of discovery in federal criminal cases have expanded during recent years, in large part because of the liberalization of Rule 16 of the Federal Rules of Criminal Procedure and an increasingly expansive view of appropriate criminal discovery by the United States Supreme Court. In *Dennis v. United States*, 384 U.S. 855 (1966), the Court held:

> [I]t is especially important that the defense, the judge and the jury should have the assurance that the doors that may lead to truth have been unlocked. In our adversarial system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to the storehouse of relevant facts.

Id. at 873.

This same sentiment was echoed in *Wardius v. Oregon*, 412 U.S. 470 (1973), as the Court spoke favorably of the proposition that the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of

information with which to prepare their cases and thereby reduces the possibility of surprise at trial. "The growth of such discovery devices is a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversarial system." *Id.* at 473-74.

The Supreme Court has further held that the "suppression by the prosecution of evidence favorable to an accused on request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 104 (1963). *Brady* places the obligation to come forward with such evidence on the government in the first instance. *Giglio v. Untied States*, 405 U.S. 150, 154 (1972). The performance of this obligation is required by the Fifth Amendment's guarantee of due process. The government is charged with knowledge of the significance of evidence in its actual or constructive possession "even if it has actually overlooked it." *United States v. Agurs*, 427 U.S. 97, 110 (1976), *United States v. Auten*, 632 F.2d 478 (5th Cir. 1980) (under *Brady*, the government had knowledge of criminal records of its key witness, even though the prosecutor chose not to run a check on the witness to obtain such information because of shortness of time);[3] *Martinez v. Wainwright*, 621 F.2d 184 (5th Cir. 1980) (*Brady* rule applied even though the prosecutor was personally unaware of the evidence that had been requested where it was available in medical examiner's office).

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[3] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981)(*en banc*) the Court adopted as binding precedent all Fifth Circuit decisions handed down prior to October 1, 1981.

In *Kyles v. Whitley,* 514 U.S. 419, 437 (1995), the Court held that the prosecution has a duty to learn of any favorable evidence known to other government agents, including the police. Consistent with *Kyles*, the courts, both before and after the *Kyles* decision, have required the government to search for exculpatory evidence in the files of government agencies which are involved in the investigation or prosecution of the case. *See, e.g. McMillian v. Johnson,* 88 F.3d 1554, 1568-69 (11th Cir.) (*"Brady"* violation occurred because of prosecutor's unawareness and consequent non-disclosure of favorable evidence was due to police concealment of such evidence from prosecutor), *amended by* 101 F.3d 1363 (11th Cir. 1996); *United States v. Brooks,* 966 F.2d 1500,1502-05 (D.C. Cir. 1992) (*"Brady"* violation occurred because prosecutor failed to search police department's homicide and internal affairs' files for information relating to credibility of deceased police officer because there was a "non-trivial prospect" that examination might yield material exculpatory information).

AL-ARIAN AS AN FBI SOURCE OF INFORMATION

In the government's Response to Defendant Sami Amin Al-Arian's Motion to Compel (Doc. 499) the government acknowledged that "defendant Al-Arian was a source of information for the FBI for a brief period of time" but refused to disclose this information claiming that the information does not fall within Rule 16(a)(1), *Brady* as information already known to Al-Arian and, therefore, not subject to the government's *Brady* obligations. However, pursuant to *Sears v. United States,* 343 F.2d 139, 142 (5th Cir. 1965), no agreement exists when an individual conspires to violate the law with one other person and that person is a government agent. To the extent that the government is attempting to tie Hatim Fariz

to Sami Al-Arian as a co-conspirator and to the extent that any ties are related to "agreements" which occurred while Al-Arian was a governmental agent, that facet of the conspiracy fails. This information is unknown to Hatim Fariz and clearly encompassed by *Brady* and thus must be disclosed by the government.

INCONSISTENT TRANSLATIONS

Moreover, the government has also taken the position, citing *U.S. v. Zambrana*, 841 F.2d 1320 (7th Cir. 1988), that it has no *Brady* obligations to provide inaccurate translations unless they fail to reasonably convey the intent or idea of the thought spoken. *Zambrana* contemplates, among other matters, the proper procedure to be utilized when a challenge to the accuracy of a transcript exists. In a wholly unrelated analysis, the *Zambrana* court found a *Brady* violation but found no prejudice. The accuracy of the transcripts played no role in the court's analysis. *Zambrana* provides absolutely no guidance concerning the government's obligations and as asserted is wholly misplaced.

The government has already acknowledged its own fallibility concerning the accuracy or inaccuracy of its translations when it admitted having misidentified the speaker in paragraph 236 of the overt acts as Abd Al Aziz Awda. This admission demonstrates the presence of inconsistent translations and the potential for others whether the inconsistency be in the content, context or identification of a particular speaker.[4] *Brady* material, however, is not limited to that which is erroneous, as in the Awda mistake, but also to that which is

[4] The government has also acknowledged that paragraphs 240, 247 and 253 are suspect due to inaccurate translations.

inconsistent. Material which can be used for impeachment purposes is subject to *Brady* and calls for disclosure. Indeed, during a discovery conference in this matter, the Magistrate Judge informed the government:

> And so in particular with regards to a request to determine whether or not the government has altered, for instance, translations that were presented to the jury – the grand jury that say one thing but now you tink don't say that, I – I think that raises a Brady issue. I think the government has to take a close look at it. And... where you've got a specific request like that, I think you've got an additional responsibility.

(Doc. 456 at 107-08).

Finally, by this Motion, the Defendant requests the disclosure of all evidence of any kind that may arguably be favorable to him. This Motion expressly encompasses any impeachment evidence, including evidence that goes to the credibility of prosecution witnesses. *Giles v. Maryland*, 386 U.S. 66 (1967); *see also Giglio v. United States*, 405 U.S. 150 (1972) (promises of leniency); *United States v. Starusko*, 729 F.2d 256 (3d Cir. 1984) (inconsistent summaries of statements of government witnesses); *United States v. Auten*, 632 F.2d 478 (5th Cir. 1980) (criminal record). This request includes, but is not limited to, the following:

1. All evidence, including statements, 18 U.S.C. § 3503(a) depositions, form 302s, handwritten notes, or documents of any kind which contradict any of the allegations in the Indictment;
2. All documents which contradict the allegations in the Indictment and otherwise:

a. relate in any way to the lawful transfer of funds to or from Hatim Naji Fariz during the relevant periods of the instant investigation and prosecution:

b. indicate, record, or demonstrate a lack of knowledge on the part of Hatim Naji Fariz as to an illegitimate purpose of the transactions at issue;

c. indicate a lack of ratification of the actions of the PIJ and/or its agents by the Defendant concerning the transactions alleged in support of the Indictment;

d. indicate, record, or demonstrate a lack of knowledge on the part of Hatim Naji Fariz as to an illegitimate purpose of transactions or related money transfers alleged or related to the allegations of the Indictment;

3. All witnesses' statements, testimony, or documents which reveal any oral or written statements or expressions by Hatim Naji Fariz to the effect that Mr. Fariz was unaware that funds were (in relation to matters referred to in the Indictment) being transferred to entities in violation of those State and Federal statutory prohibitions alleged in the Indictment;

4. All witness statements taken from witnesses as to matters related to the allegations of the Indictment which contradict the eventual testimony of those witnesses before the Grand Jury or in any final statement taken from the witnesses, including the initial

field notes prior to preparation of Form 302 statements taken by agents of the government, including but not limited to State, Federal and Israeli law enforcement, security or intelligence agents;

5. All financial and immunity and other arrangements with any potential government witness, including but not limited to domestic and foreign agents, investigators and intelligence personnel, confidential informants and all other fact witnesses, translators and transcriptionists, and expert witnesses. This disclosure must include, but is not limited to, the following:

a. Immunity from prosecution for any crime, foreign and domestic;

b. Financial benefits or payments, including tax benefits, or tax deferrals, foreign and domestic;

c. Any benefits by way of intervention with other prosecutorial authorities which the potential government witness does or might have legal difficulty, foreign and domestic;

d. Any benefits by way of shielding the potential government witness from civil liabilities, whether by assisting in the concealment of assets, assisting in the concealment of the potential government witness's person, assisting in the avoidance of civil process, assisting the potential government witness to avoid testifying in civil proceedings, or in any manner affording the potential government

witness any protection or assistance to which he would not have otherwise be entitled, foreign and domestic;

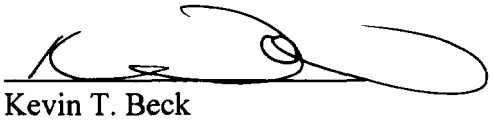
e. Any payment of expenses or agreement to pay expenses; and

f. Any other act or promise by the United States, Israeli or other government which is, or may be, of benefit to the potential government witness.

WHEREFORE, for the foregoing reasons, the Defendant requests this Court order the government to disclose to the Defendant all exculpatory evidence (*Brady* material) immediately.

Respectfully submitted,

R. FLETCHER PEACOCK
FEDERAL PUBLIC DEFENDER



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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of April, 2004, a copy of the foregoing has been furnished by hand delivery to Terry Zitek, Assistant United States Attorney, United States Attorney's Office, 400 North Tampa Street, Suite 3200, Tampa, Florida 33602 and by U.S. Mail to the following:

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